[The Robert Clarke Company, Cincinnati.] [April, 1900.

(17,385.)

Supreme Court of the United States.

OCTOBER TERM, 1899, No. 276.

Louis Loeb,

Plaintiff in Error,

vs.

The Trustees of Columbia Township, Hamilton County, Ohio.

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Brief for Plaintiff in Error on Question of Jurisdiction and in Reply to Defendant's Brief on Merits.

I.

Has this court jurisdiction of the cause through the writ of error sued out from this court direct to the circuit court?

A federal question proper and sufficient to require the question to be answered in the affirmative under section 5 of the court of appeals act was in truth presented and decided in the circuit court. The dispute is whether the question is sufficiently disclosed by the record. The question and the opinion upon it of the court below appear in its decision. The question as there stated by the district judge is:

"That said act (the Ohio statute set out in the petition) contravenes the provisions of the constitution of the United States, and that therefore the bonds are invalid" (R. 12, 21, 23).

Our claim is that the pleadings disclose three grounds of federal jurisdiction. One is diversity of citizenship. The others are (1) that the right of the plaintiff in error to recover upon the bonds sued on under the statute of Ohio, which is set out in the petition, involved by necessary intendment the construction and application of the constitution of the United States; and (2) by the demurrer to the petition the validity of this statute is challenged by defendants and is so claimed by them to be in contravention of the constitution of the United States (Sec. 5, court of appeals act). We admit that we had no right to take the writ of error from this court under the first of these grounds; we maintain, however, that we had a perfect right to do so on either of the other grounds.

The petition states the citizenship and residence of plaintiff in error to be in the State of Indiana, and that of defendants in the State of Ohio (R. 1). It next refers to a statute of Ohio passed April 27, 1893, giving its title and reference to the volume and pages thereof in which it is to be found. It then recites all the sections but one of the act (R. 1 and 2). This act authorized the issuing of certain bonds to pay for an improvement it describes. It is alleged that the act was complied with and the bonds duly issued (R. 2). Then follow allegations of ownership of the bonds which are themselves specifically set forth, and judgment with interest on each duly prayed (R. 3 to 7). Like allegations and recitals concerning the coupons follow (R. 7–9).

To this petition the defendant in error demurred as follows:

"Now comes the defendant and demurs to the several

causes of action in the petition of plaintiff herein, for the reason that the same do not state facts sufficient to constitute a cause of action against the plaintiff" (R. 11.)

In considering these pleadings and their necessary purpose and effect of presenting the federal question stated, it will not escape observation that if the act had not been specially pleaded, it is of such a character that the court would take judicial notice of it.

Lamar v. *Micou*, 114 U. S. 218, at 223.
Lloyd v. *Matthews*, 155 U. S. 222, at 227.
Beaty v. *Knowler's Lessee*, 4 Pet. 154, at 167.

There must then have been some object of plaintiff in pleading the act other than a convenient showing of the authority under which the bonds sued on were issued. Reasonable interpretation must signify that the pleader submits and relies upon the law as a warrant under not alone the state constiution, but the federal constitution, for the issuance of the bonds; he could not do so more certainly if he were to declare his object in express words. The action was at law, and was therefore to be conformed as nearly as might be with the mode of pleading in Ohio. (Sec. 914 U. S. Rev. Stat.) The statute of Ohio (R. S., sec. 5096) provides that "the allegations of a pleading shall be liberally construed."

Crooks v. *Finney*, 39 Ohio St. 58.
McCurdy v. *Baughman*, 43 Ohio St. 78.

A comparison between the law so pleaded and the requirements not only of the state constitution but of the federal constitution is thus tendered; also a claim of right to recover under this test. The allegation of ownership and demand, and refusal of payment and the prayer (R. 3, 4, 5 and 9) in respect of bonds issued under the law so pleaded, necessarily asks the federal court to construe the law under the federal constitution. We maintain, therefore, that con-

sidering the petition *alone*, it presents a "case that involves the construction or application of the constitution of the United States," within the meaning of section 5 of the court of appeals act. No other reason can be assigned for setting out the statute at all, for the Ohio decisions, as we shall show later, sanctioned the statute and the issue of such bonds at the time of their issue.

We are entitled to add to this ground the purpose and effect of the demurrer. It alleges that the petition does not "state facts sufficient to constitute a cause of action against this defendant" (R. 11). It is true that this is a challenge of the legal sufficiency of the petition as an entirety. It is also true that it is a challenge, under the federal constitution, of the validity of the law so pleaded. Hence, we also maintain that the case is "one in which the . . . law of a state is claimed to be in contravention of the constitution of the United States," within the meaning of section 5 of the court of appeals act.

The plaintiff sued out a writ of error from this court upon the grounds so stated in our contention. (See petition for writ of error, and, as part thereof, the accompanying assignments of error, R. 24.)

Holder v. *Aultman*, 169 U. S. 81, sustains these claims, and also sanctions the taking of the writ of error from this court direct to the circuit court.

Diversity of citizenship was the ground of invoking jurisdiction of the circuit court of the United States for Michigan. The declaration contained a count on a contract between the parties and also the common counts. Defendant relied on a statute of Michigan, and alleged that the contract sued on was made and to be performed in violation of the statute, and was void for that reason. Plaintiff recovered judgment. Defendant sued out a writ of error from this court, on the ground that the case was one in which a law of a state was claimed to be in contravention of the constitution

of the United States, within section 5 of the act of March 3, 1891.

Upon this record, Mr. Justice Gray, at p. 88, said:

"This was, therefore, . . . rightly brought directly to this court by writ of error under the act of March 3, 1891, c. 517, sec. 5, 26 Stat. 828. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S. 685."

Penn Mutual Life Ins. Co. v. *Austin*, 168 U. S. 685, is another authority in favor of our contention. Both diverse citizenship and impairment of contract by statute and ordinance were alleged. Demurrer was sustained. Appeal was direct to this court. Objection was made that the appeal should have been had in the circuit court of appeals. To this Mr. Justice White answered, at p. 694:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason."

At p. 695:

"But the words of the statute, which empower this court to review directly the action of the circuit court, are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal constitution."

There are several features of these decisions which merit especial observation. One is that diversity of citizenship was not allowed to prevent this court from taking ju-

risdiction under sec. 5 of the act of March 3, 1891, where another ground under the section appeared either in the petition or *the answer*. This is quite significant, since in *Holder* v. *Aultman*, citizenship is made the basis of jurisdiction in the declaration, and the statute which was claimed by plaintiff to be in contravention of the federal constitution was set up in the answer, not in the declaration. The logic of those decisions is that the circuit court of appeals cannot take jurisdiction of such a case; for under section 5 of the act of March 3, 1891, this court alone is given jurisdiction.

It may not be improper to call attention here to the practice in the circuit courts of appeal in cases involving questions under section 5 of said act of March 3, 1891. In *Davis* v. *Burke*, 97 Fed.., at p. 502, it is said:

"The circuit courts of appeals, so far as they have construed these provisions, have uniformly denied their own jurisdiction of appeals and writs of error in cases which involved the construction or the application of the federal constitution. *The City of Macon* v. *Georgia Packing Co.*, 9 C. C. A. 262, 60 Fed. 781; *Railroad Co.* v. *Adams*, 35 C. C. A. 635, 93 Fed. 852; *Wrightman* v. *Boone Co.*, 31 C. C. A. 570, 88 Fed. 435; *Hastings* v. *Ames*, 15 C. C. A. 628, 68 Fed. 726; *Pauley Jail Bldg. & Mfg. Co.* v. *Crawford Co.*, 28 C. C. A. 579, 84 Fed. 942; *Barr* v. *City of New Brunswick*, 19 C. C. A. 71, 72 Fed. 689. The objection to the jurisdiction of this court must be sustained, and the appeal will be dismissed."

Illinois Central R. Co. v. *Adams Cent. R. Co.*, 93 Fed. 852, at 856.

In re Aspinwall's Estate, 90 Fed. 675.

Hamilton v. *Brown*, 53 Fed. 753.

C. M. & St. P. Ry. Co. v. *Evans*, 58 Fed. 433.

Again, jurisdiction under said section 5, unlike a case coming from the highest court of a state, does not depend upon whether the right claimed is upheld or denied. Still

another point of the decisions is that jurisdiction under said said section 5 "is not limited to the constitutional question, but includes the whole case." And in *Holder* v. *Aultman*, where this language was used, the court did not find it necessary to pass on the ground under which alone it acquired jurisdiction.

See also *Penn. Ins. Co.* v. *Austin*, *supra*, at p. 695; also *Scott* v. *Donald*, 165 U. S., at 72, where Mr. Justice Shiras said:

"As the case is before us, in a case in which the law of a state is claimed to be in contravention of the constitution of the United States, under another clause of the statute, we have jurisdiction of the entire case and of all questions involved in it. *Horner* v. *United States*, 143 U. S. 570; *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181; *Chappell* v. *United States*, 160 U. S. 499.

It follows that when a case falls within any of the six specified classes of section 5 of the judiciary act of March 3, 1891, a writ of error or an appeal may be taken directly from the circuit court to this court, no matter whether other questions are involved upon which the case might have been decided or not.

Analogy drawn from rule in respect of cases from highest courts of states.

In *Borgmeyer, administrator*, v. *Idler*, 159 U. S. 408, at 414 (to which we shall again refer), Mr. Chief Justice Fuller, in alluding to the analogy between the requisites of records of cases sought to be brought to this court from inferior federal courts and those of the records of state courts attempted to be brought here, said:

"The point was long ago settled in principle upon the record of a suit in a state court."

Furman v. *Nichol*, 8 Wall. 44, involved a record which in principle is analogous to the present one. The question de-

cided arose upon a petition for mandamus which set forth the charter of a bank and particularly the provisions of one of its sections, according to which it was alleged that certain bank notes had been properly issued and plaintiff had become the owner thereof, but that a county clerk refused to accept the notes in payment of taxes in violation of the contract involved with the people of the state under the bank charter. The county clerk demurred. The court of original jurisdiction overruled the demurrer, but the supreme court of the state reversed the decision. Nothing was expressly stated in the petition or the demurrer or in the judgment to indicate that a federal question was made. Mr. B. R. Curtis, on behalf of apellants, after citing the case of *Bridge proprietors* v. *Hoboken Company* (1 Wall. 143), said (at p. 49):

"If any one will observe the character of the petition and of the demurrer, it will be as obvious without argument as with it, that the question raised and decided was, by necessary intendment, none other than the constitutionality of the act of repeal, as against the plaintiffs, in violation of the contract with the state to receive the notes for taxes, and the decision in favor of its validity."

Messrs. Maynard and Harrison, *contra*, argued at p. 51:

"It is nowhere averred in the petition, as it ought to have been in order to bring the case within the twenty-fifth section, that the state had passed a law impairing the obligation of a contract. Nor can this be inferred by any necessary intendment from the record. The court below does not assign any reasons why it sustained the demurrer," etc.

Mr. Justice Davis, at p. 56, said:

"If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court

erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits."

Water Power Co. v. *Street Ry. Co.*, 172 U. S. 475, came to this court on error to the Supreme Court of South Carolina. It was moved to dismiss the writ of error upon the ground that no federal question was involved, and even if there were, it was not "specially set up and claimed" in the state court, as required by the Revised Statutes. No mention was made of the federal constitution in the complaint, and the theory of the plaintiff's case had to be ascertained by reference to the answer. Mr. Justice Brown, at p. 485, said:

"The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same, is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent state action appears on the face of the pleadings."

After pointing out, at p. 488, the distinction between the several classes of cases which can be brought from a state supreme court to this court, and showing that only in the third class it is necessary that the "title, right, privilege or immunity" must be "specially set up and claimed," the learned justice, proceeding to hold that the case was properly brought to this court, said:

"But where . . . the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact

that it was not specially set up and claimed is not conclusive against a review of such question here."

Telluride Power Transmission Co. v. *Rio Grande Ry. Co.*, 20 Sup. Ct. Rep. (Feb. 1, 1900), 245, at p. 248, right column, lays down the rule in the same language as that above quoted.

The only possible way in which the rule established by these decisions and those cited in them could be escaped, would be to show that the case could have been determined without deciding the question upon which we rely. The only possible way of doing this would be to show either that the circuit court had no jurisdiction, or that the statute in question was not only invalid under the state constitution at the time the decision was rendered in the court below, but that such invalidity would have been declared in the state court at the time of the issue and sale of the bonds. The defendant in error, indeed, sought to carry both of these points in the court below, but failed (R. 12). The district judge stated two of the points thus made in support of the demurrer, as follows:

"I. The petition does not show that the plaintiff, Louis Loeb, is the original holder of the bonds sued on, and if he be an assignee or subsequent holder thereof he is not entitled to maintain this action, because the bonds were payable to bearer and were not made by a corporation.

II. That the act of the General Assembly of the State of Ohio, under and by virtue of which the bonds were issued, contravenes the provisions of the constitution of the State of Ohio, and that therefore the bonds are invalid." (*Ib.*)

The theory upon which the first point was urged was that Columbia township is not a corporation within the meaning of the act of Congress (1 Supp. 612), which in substance provides that no circuit court shall take cognizance of a suit involving a chose in action in favor of an assignee or any subsequent holder, if the instrument be payable to

bearer "and be not made by any corporation, unless such suit might have been prosecuted in such court . . . if no assignment . . . had been made." But section 1376, R. S. O., provides that:

"Every civil township heretofore or hereafter lawfully laid off and designated, is declared to be and is hereby constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law; it shall be capable of suing and being sued, pleading and being impleaded."

In *Lane* v. *The State*, 39 Ohio St. 312, at 314, it is said that under this section "townships are corporations."

Harding v. *Trustees of New Haven Tp.*, 3 Ohio, 227, at 330–1.

Howard v. *Wheatstone Township*, 10 Ohio, 365 at 369.

This we submit is sufficient to bring townships within the meaning of the words "any corporation" as used in the act of Congress aforesaid of August 13, 1888 (1 Supp. 612).

Lincoln Co. v. *Luning*, 133 U. S. 529.

It is true that in *Brattleboro Sav. Bank* v. *Board of Trustees*, 98 Fed. 524, Judge Taft has recently said that the statute declaring townships to be corporations is not sufficient to bring them within the provision of sec. 1, art. 13, of the constitution of Ohio, forbidding the general assembly to pass a special act conferring corporate power; but this was on the theory that townships were not within the evils which the history of private corporations and municipalities reveals as the cause for adopting that constitutional provision. He does not hold that a township is not a coporation for some purposes. The statute declares it to be a corporation "for the purpose of enjoying and exercising the rights and privileges conferred upon it by law." The right and privilege of issuing the bonds in dispute were conferred by law, and

the township corporation must be treated in this case as having been erected into a coporation for that purpose at least. *State* v. *Comrs.*, 37 Ohio St. 526, 1*st syl.*

Apart from this, there are two objections to the point which deserve a moment's notice. One is that since there is nothing to show that the bonds were ever assigned to any one or that plaintiff in error is a "subsequent holder" within the meaning of the act of Congress, it follows that he must be treated as the person to whom the bonds were *directly issued*, despite the rule that where assignments or subsequent ownership appear, affirmative allegations as to the residence of the assignor or former owner are required. The other is that the question so made goes to the jurisdiction of the circuit court, and under sec. 5 of the court of appeals act, such questions "shall be certified to the supreme court from the court below for decision."

As regards the second point made in support of the demurrer, while it is true that recent decisions of the Supreme Court of Ohio render the statute set out in the petition invalid, yet at the time these bonds were issued the very reverse of the rule recently laid down was the established doctrine of Ohio. (See our original brief, pp. 17, 18.) We scarcely need say that this change of decision by the Supreme Court of Ohio could not affect the validity of these bonds.

It therefore follows from what has been shown, that the court below could not have reached its decision without holding, as in truth it did hold, that the statute set out in the petition contravenes the fourteenth amendment to the constitution of the United States. Every other point was decided in favor of the plaintiff in error. The case then as made upon the pleadings alone falls within the decisions of this court before cited, which hold that the questions disclosed by the pleading vest jurisdiction.

Pleadings present a definite issue as to validity of statute under federal constitution.

We may safely go further. The pleadings present under the federal constitution *an issue* as to the validity of the statute set forth in the petition. Analysis of the petition and demurrer discloses this issue as certainly as if the parties had said in words that each relied on the fourteenth amendment—the plaintiff to sustain the act, and the defendant to destroy it. Do we have to resort to the alphabet to have an issue of this kind displayed? The court has had occasion to speak plainly at times when it was apparent that no federal question had in truth been presented or decided in the court below. The language used in decisions rendered in such cases could not have been intended for records like the present one. Sentences extracted from those decisions and isolated from the circumstances under which they were formed, are a fertile source for argument by general definitions. But such arguments are artificial. They might be misleading in a court that did not know they were torn from their surroundings and both misapprehended and misapplied.

To illustrate: In *Ansbro* v. *United States*, 159 U. S. 695, Mr. Chief Justice Fuller, after vainly searching through all sorts of papers for an alleged federal question, said: "But we cannot find that any constitutional question was raised at the trial." And, at p. 698, he further stated that "a definite issue . . . must be completely deducible from the record," holding that an assignment of errors "can not be availed of to import questions into a cause."

Cornell v. *Green*, 163 U. S. 75, was another case in which the first suggestion of a federal question appeared in the assignment of errors; approving the language of the learned chief justice above quoted, Mr. Justice Gray, at p. 78, used language which we submit clearly supports the present writ of error:

"But, in order to bring a case within this clause of the act (the judiciary act of March 3, 1891), the circuit court must have construed the constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it."

In *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, it was claimed that a treaty was involved, but Mr. Chief Justice Fuller, in the closing sentence of the opinion, said: "The construction of the treaty was not drawn in question in any manner." The approval there given of the decisions above alluded to must consequently be read with reference to this fact. This is also true of the statement made at page 436: "And it is settled that, in order to give the circuit court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim." We need not repeat our insistence that the present case does make such a "statement of his claim."

We do not overlook the fact, before mentioned, that plaintiff in error also stated diversity of citizenship as a ground of jurisdiction. But we contend that this is not inconsistent with the setting forth and tendering for issue in his petition of the statute upon which he relied, or with the issue joined thereon by the demurrer as to its validity under the federal constitution. In *Muse* v. *Arlington Hotel Co.*, *supra*, at p. 436, allusion is made to the fact that "jurisdiction of the circuit court was invoked on the ground of diverse citizenship and not on the ground that the case arose 'under the constitution or laws of the United States, or treaties made, or which shall be made under their authority.'" Again, in *Colorado Central Mining Co* v. *Turck*, 150 U. S. 138, the same fact appears, the court saying, at p. 144, "that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested *or could be asserted* on any other ground." (Italics ours.) It was further declared

in that case that some question of a federal nature "must appear at the outset, from the declaration or the plea of the party suing, that the suit is of that character" (at p. 143), the court announcing later that jurisdiction "could not be affected by the subsequent developments" (p. 144). But it was also said on the same page: "If the plaintiff had invoked it on two distinct grounds, one of them being independent of the diverse citizenship, a different question might have been presented." We but repeat when we urge that the present case presents the "different question" thus sanctioned.

We may, however, be permitted to say that it is difficult to see why a case brought in the circuit court on the ground of diversity of citizenship may not have another federal question introduced into it by defendant within the purview and meaning of section 5 of the judiciary act of March 3, 1891. Suppose the plaintiff in error had set up and sued on only his bonds, and defendant in error had by answer specially pleaded the statute in dispute alleging that it contravened the fourteenth amendment to the constitution of the United States, what is there in section 5 of the act of March 3, 1891, which ought to prevent the losing party from taking a writ of error from this court direct to the circuit court? What is there in that section which in this regard would differentiate the right of the losing party under section 709 of the Revised Statutes to come here from the state supreme court, if the case had been brought in a state court instead of the federal circuit court under precisely the same pleadings as those supposed in the last preceding hypothesis? The jurisdiction of the circuit court would be complete upon the petition alone; that jurisdiction could not be impaired by the defendants specially setting up another ground. The two sections make no distinction between the rights of plaintiff and those of defendant in this behalf. Indeed the language of the two sections seems in substance

to be the same. "Drawn in question" will be found in both sections. And what is the difference between that phrase and "claimed to be in contravention"? or "in any case that involves?" Why then should not the course pursued in *Water Power Co.* v. *Street Railway Co.*, *supra*, be followed in the case supposed, and also, in the case at bar? At p. 485 of that case it is said:

"The complaint did not set up the contract of the board of directors of the penitentiary with the defendant and the act of the general assembly of December, 1892, confirming the same, but these were both set forth in the answer and relied upon by the defendant as its authority for the erection of its works."

Indeed, it seems to be settled that in all cases coming here, as that one came, from a state court of last resort, this court will look into the answer and into grounds "developed in the course of the proceedings" for a basis of jurisdiction. True, this could not be done as a means of giving a federal inferior court jurisdiction, because that court ca not entertain a case which does not present a ground for jurisdiction primarily. But can it be that the presence of a primary ground of jurisdiction, like diversity of citizenship, will prevent the court from looking into the answer? The important and ultimate question may be presented only by the answer. This is always so, where citizenship is plaintiff's only ground. Should the immaterial ground in point of importance, control the material one?

We know it was said in *Ex parte* Jones, 164 U. S. 691 (and repeated in *Third St. and Suburban Ry.* v. *Lewis*, 173 U. S. 457, and in *Pope* v. *Louisville, New Albany, etc., Ry.*, Id. 573, following *Colorado Central Mining Co.* v. *Turck*, *supra*), that where jurisdiction is originally invoked solely on the ground of citizenship, the judgment of the court of appeals would be final, despite the fact that another ground is developed by the later proceedings. But it is not said there

that if the other ground were actually found to be within any of those specified in section 5 of the act of March 3, 1891, the case could go to the court of appeals, or that the decision would be final if taken there. Such an interpretation of those cases would bring them into direct conflict with *Holder* v. *Aultman*. This is especially so if the presence of a *bona fide* claim that a ground of jurisdiction under section 5 is involved, would not change the course of the cause from the court of appeals to this court; that is, from the course which diverse citizenship alone would require. That, too, would accord to a plaintiff a privilege under the appellate jurisdiction of this court which would be denied to a defendant under precisely similar allegations. We have already shown that the universal practice, so far as the decisions have been made upon the point in the circuit courts of appeals, is that they deny jurisdiction to themselves in such cases, and *Holder* v. *Aultman*, before cited, sustains this practice.

There is one more feature to which we desire to call attention. It is whether we may rightfully ask the court to examine the decision of the court below as an aid to interpreting the record. It was said in *England* v. *Gebhardt*, 112 U. S., at 506, not to speak of other cases, that the rule requiring a copy of the opinion to be annexed to the record does not make it a part of the record. It was laid down in *Kreiger* v. *Shelby Railroad Co.*, 125 U. S., at 44, as "the settled course of decision," that where *statutes* require opinions to be recorded, the court may examine them "to ascertain the ground of the judgment of the state court." And in *Water Power Co.* v. *Street Railway Co.*, *supra*, without stating whether a statute required opinions to be recorded, it was said (172 U. S., at 489), "as it appears from the record and *the opinion* of the court, which may be examined for that purpose, . . . that the question was presented and decided." (Italics ours.) It may be that the court was indif-

ferent about the opinion in that case, because the question appeared in the record as well as the opinion. As it seems to us, the court would naturally refer to the opinion at least as an aid to the interpretation of the record. (See reference made to opinion in *Whitten* v. *Tomlinson*, 160 U. S., at 244–5.) Why should it not? What is the reason for the rule requiring it to be annexed to the record? What is the distinction between a rule and a statute in this respect, since both are alike law to those making and certifying to the records? We respectfully submit that enough appears here to satisfy the court that the writ of error was properly taken direct to the circuit court.

II.

Reply to brief of defendants in error on the merits of the case.

It will not escape observation that the burden of the argument of our learned adversaries upon the merits of the case, is an effort to show that the statute under which the bonds in dispute were issued is in violation of the fourteenth amendment of the Constitution of the United States. They have devoted nearly twenty pages of printed matter to show that this is the ultimate question and that it should be resolved in favor of the defendants in error. It is a striking commentary upon the first ten pages of their brief, which are employed to show that no such question is involved in the record. It scarcely need be said that the constitutional question they argue falls clearly within section 5 of the judiciary act of March 3, 1891. Should the art of fencing be indulged in any longer or should we enter at once into an analysis of the ulterior rights of the parties?

The essence of the argument to show that the bonds are invalid is, that notice of the act under which they were issued is written on their face, and that constructive knowledge of the invalidity of the act and likewise of the bonds, follows as a consequence; and thus it is sought to distinguish the present case from *State* v. *Commissioners*, 37 Ohio St. 526, not to speak of the failure even to allude to *United States* v. *Ft. Scott*, 99 U. S. 152,—decisions upon which we rely in our first brief.

Counsel base their claim of unconstitutionality of the act in dispute upon (1) its mandatory character under the Ohio constitution; (2) alleged analogy between the third section of the act and the statute construed in *Norwood* v. *Baker* under the federal constitution; and (3) denial of severability as between section 3 and the rest of the act.

As shown in our first brief (at p. 17) when these bonds were issued, mandatory legislation of the character now in question was sanctioned by the court of last resort of the State of Ohio.

In *State ex. rel.* v. *Commissioners*, 35 Ohio State, at p. 467, Okey, J., announcing the unanimous opinion of the court, said:

"The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards shall have power of local taxation, as may be prescribed by law.' Art. 10, Sec. 7. Manifestly this is no limitation on the power of the general assembly, and the inquiry therefore is as to the extent of such power. That it is only legislative is conceded, but (it) is undeniably a very broad power and includes, generally, the right to direct, *in invitum*, the construction and repair of public highways, and the levy of taxes to defray the necessary expenses thereof."

That decision was made in the year 1880, and it was subsequently approved in *Kumler* v. *Silsbee*, 38 Ohio St., at 447. The rule was never disturbed until 1896, when it was reversed (See cases cited at p. 17 first brief). Meanwhile, to-wit, on September 29, 1894 (R. 2), the bonds now in question were issued. It is not contended and of course could not be, that the validity of these bonds is in any manner affected by the change of judicial decision. (See cases cited at p. 18 former brief).

It follows that when these bonds were issued and the township received the money for them, there was nothing, at least in the Constitution of Ohio as construed by its highest judicial tribunal, to put the purchaser of the bonds upon notice of any want of power in the legislature so to authorize their issue.

But it is claimed in substance that the purchaser of the bonds was chargeable with notice of alleged conflict between the third section of the act and the fourteenth amendment to the Constitution of the United States. True, *Norwood* v. *Baker* had not been decided; but constructively it is said the layman knew that it would be. One difficulty however with these claims of our adversaries is, that they fail to observe what is pointed out in our first brief, to the effect that a rule of judicial decision has always prevailed in Ohio which forbids the levying of special assessments on the part of any public agency in excess of the special benefits conferred; but another difficulty with such claims is that they fail to observe the distinction between a general law, like the one involved in *Norwood* v. *Baker*, and a special law like the one involved here. The statute in *Norwood* v. *Baker* conferred general power upon all villages of the municipal class to which Norwood belongs, through their local councils, to levy assessments of the character there questioned. In enacting that statute, the legislature had no particular street or highway in view, but empowered the village councils to employ the

power in respect to any and all highways which in their judgment should be opened or improved. The vice of such a statute, as we understand the majority decision of this court, was found to be its failure to impose upon the local authorities a duty to observe the rule of benefits in making special assessments. The local authorities were therefore thought to be vested with an arbitrary power contrary to the provisions of the fourteenth amendment.

But in the case at bar the statute is special; it relates to a particular highway, Williams avenue; it describes particular territory which shall be assessed to pay the cost of that improvement; the general assembly itself pursuant to constitutional right and power, as then held by the court of last resort of the state, must therefore be deemed to have considered the subject of special benefits, and to have determined either that the benefits to the prescribed territory would at least be equal to the cost of the improvement, or that if there were any excess of cost it should be included in the obligation of the township itself to pay the bonds which is implied from the direction to issue them to pay for the improvement (R. 1 and 2, and 90 Ohio Local Laws, 251 and 252). In either case the subject of benefits must be conclusively presumed to have received due consideration at the hands of the legislative body which exercised the power. At that very time there was a general law upon the statute books of Ohio which declared that "so far as practicable . . . . regard must be had, in making special assessments, to the probable benefits to the property assessed" (R. S. sec. 2283). True this was a statutory injunction upon creatures of the general assembly; but it cannot be that the creator of such a provision will be presumed itself to ignore the injunction; that would be to presume "that the legislature designed a palpable invasion of the rights of private property, which is not admissible." (*Walsh* v. *Barron, Treas.*, 42 W. L. B. 302 at 306, per Supreme Court of Ohio.)

In *Williams* v. *Eggleston*, 170 U. S. 304, 311, it is said:

"Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited."

Mr. Justice Harlan, in his comment upon this, in *Norwood* v. *Baker* (at p. 279), drew a distinction between a general and an absolute rule respecting assessments without regard to benefits and apparently condemned the absolute rule only when there was no remedy furnished to the property owner to protect himself against its exercise. He said (at p. 279): "and without any right in the property owner to show when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." In view of what we have already shown respecting the existence of the judicial rule in Ohio forbidding such assessments and giving property owners full remedy against them, the relevancy of *Williams* v. *Eggleston*, to a case like the present one would seem clear.

In *Parson* v. *District of Columbia*, 170 U. S. 45, an act of congress was sustained which determined the area benefited by a public improvement in the District of Columbia to be only the abutting property and fixed the assessment at a uniform rate per front foot on the area so defined.

Spencer v. *Merchant* 125 U. S. 345.

If then a statute would be valid which would authorize municipalities or other local agencies to levy assessments under express injunction to observe the rule of special benefits, it inevitably follows that wherever as in this case the

legislature itself directly exercises the power, it will be conclusively presumed to have investigated into the subject for the very purpose of comparing the probable cost with the probable or apparent special benefits.

The result is that when a purchaser obtained any of the bonds in dispute he was entitled to the benefit of the presumption that the general assembly of Ohio had complied literally with the requirements of the fourteenth amendment. He was also entitled to the benefit of the doctrine that every property holder who should complain that the assessment against him was in excess of the special benefits he received could have such excess enjoined by the proper court of his county and that decision confirmed by the supreme court of his state (R. S. O. 5848). It is therefore difficult to perceive how a person intending to purchase such bonds could be chargeable with knowledge of any invasion of the fourteenth amendment.

The alternative of this contention, as already suggested, is that the purchaser of the bonds was entitled to presume that any possible excess of cost over special benefits would be met and paid under the general township obligation which the statute authorized by its direction to issue the bonds, and which the township incurred by issuing them and receiving the money on them. This was the law of Ohio at the time these bonds were issued. Section 4 of the act in dispute expressly authorized and directed the trustees "to issue the bonds of the township." *State v. Commissioners* (37 Ohio St.), cited in former brief, was a suit to recover upon county bonds. The bonds were to be paid by assessment. The assessment was insufficient. The insufficiency arose out of a failure of property holders to petition for the improvement. This petition was a prerequisite, a condition precedent to the right to make the improvement at all. Say the court, at p. 530:

"As between the county and the taxing district created by the statute, to-wit, 'the territory within two miles of the road improvement,' it cannot be doubted that the intent of the statute was to impose the burden of the improvement upon the latter; but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county to the extent of all its taxable property was pledged, by the express authority given to the commissioners to issue therefor 'the bonds of the county.' Whenever, therefore, payment of the bonds cannot be provided for, by local assessment under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county."

The second paragraph of the syllabus of that case, upon which all the judges agreed under their rule, states:

"When from any cause sufficient money be not realized from such local assessments to pay the debt so created, it is the duty of the commissioners to levy a tax therefor upon all the taxable property of the county."

That decision was rendered in 1882 and was approved on the very point now presented, in 1884 (*Holtz* v. *Commissioners of Henry County*, 41 Ohio St., at 434); and the decision has not been disturbed since. The legislature must therefore be presumed to have known at the time it passed the act now in dispute, that if there was a failure or deficiency of assessment from "any cause," it was imposing a township obligation which would have to be met and satisfied out of a general levy. It must also be presumed to have known at the time it passed the act, that if the deficiency arose from an excess of cost over special benefits, the judicial department could be successfully invoked to remedy the matter, and so the property holder was doubly protected against an invasion of his rights in violation of the fourteenth amendment. If then we are to ascribe to a purchaser of these bonds knowledge of all

the questions which could be raised touching their validity, we must not overlook the state of the law as it existed in Ohio at the time.

Although it is not necessary to our argument, we suggest with deference that the court should reconsider the decision in *Norwood* v. *Baker*. We cannot discover that the court's attention was called to the portion of Rev. Stats. of Ohio, section 2283, which imposes duty as to special benefits, before quoted. That provision belongs to the assessment law under consideration in the Norwood case, and naturally should be construed as part of that law. "*Regard must be had* . . . to the probable *benefits* to the property assessed."

As shown in our first brief (p. 19), council had a choice of three modes of levying assessments. One was "in proportion to the benefits." Another was by the front foot." If the ordinance in that case had in terms disclosed an exercise of the first of these powers no question could have arisen; the assessment would have been in express words "in proportion to the benefits." Yet the assessment levied "by the front foot" was made subject to the injunction of section 2283, that "regard *must* be had . . . to the probable *benefits*." If one abutting lot were benefited more or less than another, this would necessarily mean that the rates of assessment should be varied according to the benefits conferred.

Then by sec. 5848 of the Revised Statutes, before referred to, it was further provided:

"Courts of common pleas and superior courts shall have jurisdiction to enjoin illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof. . . ."

We need not again cite the decisions of Ohio which condemn levies made in excess of benefits as "the illegal

levy of . . . assessments," within the meaning of this section. Section 6, article 13, of the Ohio constitution, provides that

"The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of . . . assessment . . . so as to prevent the abuse of such power."

Now, are not the statutory provisions so made a reasonable compliance with this injunction of the Ohio constitution? Precisely how can the general assembly comply with that provision, or how can it rationally avoid invasion of the fourteenth amendment, if such provisions are not appropriate and sufficient for doing so?

Besides, common experience shows that benefits ordinarily and naturally accrue to private property by the construction of public improvements such as streets. There is then a general presumption in favor of special benefits. We therefore respectfully urge that there is no foundation for the claim that the Ohio statutes warrant the levy of special assessments without regard to special benefits. he statutes are just the other way. And if a local authority abuse the power, the courts are made a statutory instrument to remedy the abuse. The Ohio courts are quick to restrain such abuses. The federal courts ought not to do less; but ought they to do more? Ought they to strike down the system?

The suggestion of counsel that a re-assessment could not be made, is vain. It is said it could not be done because the re-assessing statute of Ohio applies to municipalities. But the power to assess under the act in dispute cannot be exhausted by an erroneous exercise of the power. As said by the Supreme Court of Ohio, in *Walsh* v. *Barron*, 42 W. L. B. 302, at end last paragraph, second syl.:

"When an assessment is made in substantial excess of

the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles."

The same end would be accomplished by setting aside an inaccurate assessment, if one were made under the present act, and allowing an accurate one to be levied under the original power. This would be only one rightful exercise of the power.

The statement at bottom of page 12 of our adversaries' brief, to the effect that we admit the act to be unconstitutional in one of its features, is a misapprehension. What we said was that the recent decisions of Ohio hold that mandatory assessment statutes are invalid; but we showed that the decisions in force at the time of the issue of our bonds sanctioned such statutes (First Brief, p. 17); also that such a change of judicial decision could not impair the bonds (Id., p. 18). Counsel must then use something other than our admission to make the decisions mentioned at top of page 13 of their brief relevant.

Counsel's attempt to show that the assessment clause of the act is invalid under *Norwood* v. *Baker* is equally futile, for reasons already stated. What then should be said of their discussion of the severability of the act? The citation of cases to show more than the principles underlying severability or non-severability is not very helpful, because each case depends so much upon its own peculiar facts. Analysis of the statute is more to the point. We conceive that counsel have not answered our first brief in this regard. It is no answer to say that the legislative provision for assessing particular lands shows an intention not to place the cost on the township at large. This ignores the authority and direction to issue the bonds *in advance* of the improvement. The bonds are obligations of the township at large. They were and are a township-undertaking of all risks of the assessment. This is the logic of the situation; it is also the *ratio decidendi* of

United States v. *Ft. Scott* (99 U. S. 152), and *State* v. *Commissioners* (37 Ohio St. 526), cited *supra*, and also relied on in our first brief (B. 9, 10.)

The bonds sued on are, therefore, independent promises of the township, upon which their face value in money was received, and is still retained. It was open to the township to refuse to issue the bonds, just the same as it is to refuse to pay them. Can it be that such promises can be repudiated successfully, simply because the township chooses at this late date to question one of the sources from which it may obtain the necessary money? Can it be that such repudiation would be sustained, even if the assessment were for any reason uncollectible?

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